IN THE HIGH COURT OF JUDICATUE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

CHAMBER SUMMONS NO. 1157 OF 2003
IN
SUIT NO. 4847 OF 1995

Feroze Homi Duggan ..... Plaintiff
v/s.
1. Benzer Interiors Private
and Ors. .... Defendants

Mr. H.J. Thakkar Senior counsel with Vivek Solaman and co. for the plaintiffs.
Mr. Sanjay Jain a/w. Mrs. Deepa Mani and Ms. Naina Nerker i/b. S.K. Srivastav and Co.for defendant no.1.
Mr. R.L. Tolat i/b. L.C. Tolat for defendant no.7.

CORAM: S.U. KAMDAR,J.

DATE : 25TH JANUARY,2005.

P.C. :

1. The present Chamber Summons has been taken out for direction to the plaintiff that the tape-recorder in which the conversation has been recorded of the plaintiff and that of some of the defendants alongwith the original tape recordings and the transcriptions be deposited in this court and the said tape recorder should be kept in

safe custody in this Hon’ble Court till further orders. The aforesaid Chamber summons has been taken out in a suit which has been filed by the plaintiff inter-alia seeking relief that the MOU dated 4.4.1994 and agreement of sale dated 4.4.1994 alongwith tenancy agreement dated 6.6.1994 should be declared as cancelled and that they cease to subsist and therefore the defendants have no right, title and interest in respect of the suit properties under the said documents. An alternate prayer is also made that all the transactions which are recorded in the agreement and or relationship created by the said agreement should be declared as null and void, illegal and of no effect. The subject matter of the suit is in respect of the property being land admeasuring 4080 sq.yds situated at survey no.7191 of Malhabar Hill Division alongwith a bungalow standing thereon known as Lawnside and a out-house and garage situated at Harkness Road, Bombay.

2. The learned counsel for the defendant no.1 has in support of the chamber summons pointed out that in para-68 of the plaint which is on page 70 of the paper book, the plaintiffs themselves have made a statement

that the original tape recordings will be placed under a sealed cover and will be deposited with this Hon'ble Court for safe custody and preservation so that the same can be utilized at the appropriate time. The aforesaid averments made in para-68 of the plaint read as under :

> "68. The Plaintiff has personally checked the transcripts of the tape recordings with the original tapes and verified the correctness of the said transcript. The Plaintiff is advised to put the three tapes as also the transcript in a sealed cover and deposit the same with this Hon'ble Court for their safe custody, preservation, protection and for use at appropriate time."

3. According to the learned counsel for the defendant no.1 the plaintiff has mentioned in para-1 of the plaint that he is a nuclear physicist by Therefore according to him he is capable of altering and or interfering and or tampering with the evidence of tape which are kept by him in his own custody. He has also pointed out that even the transcription of the said script has not been furnished by the plaintiff herein. According to the learned counsel for the defendant no.1 it is in the interest of justice that the said tape

recorder be deposited by the plaintiff with the office of the Prothonotary and Senior Master, High Court, Bombay so that it can be utilized at appropriate stage in the course of the evidence and till that time the sme can be properly preserved.

4. The learned counsel for the plaintiff has on the other hand opposed the said chamber summons and has inter-alia contended that the present application should be not be granted. According to the learned counsel for the plaintiff, the conduct of the defendant no.1 is such that the relief as sought for should not be granted. According to him the defendant no.1 is capable even of interfering and or tampering with the custody of the tape recorder in the office of Prothonotary and Senior Master, High Court, Bombay. According to him the defendant no.1 can have a reach to the said tape recorder and no record in this Hon'ble Court is safe in view of the conduct on the part of defendant no.1. In view of the aforesaid contention the plaintiff has relied upon the order of the Division Bench of this Hon'ble court passed in notice of Motion no. 2239 of 2000 in Appeal no. 324 of 1997 particularly the following observation :

> ". At the outset we may observe that the respondent no.8 - one of the directors of this appellants who has filed undertaking before this court in the month of April 1997 sought to interfere with the administration of justice by contacting one of us (Nishita Mhatre, J.) which was indeed very disturbing and amount to contempt of the court. We initially thought of initiating action of contempt against respondent no.8 for having attempted to pollute the stream of justice but then on second thought persuaded ourselves that our expression of displeasure and our stern warning must have necessary effect on respondent no.8 and she would not make any such attempt in future. We warn the respondent no.8 to desist from such attempts in future and rest this aspect here."

5. The learned counsel for the plaintiff has contended that the aforesaid observation indicate that the defendant is capable of any kind of conduct and in view thereof it is not safe that the tape recorder should be deposited in the office of Prothonotary and Senior Master, High Court and therefore the present chamber summons should be rejected. The second contention raised by the learned counsel for the plaintiff is that the averment made in para-68 of the plaint states that the said tapes and transcription will be placed in sealed cover and deposited with the Hon’ble court at the appropriate time. According to the learned counsel for

the plaintiff that appropriate time has yet not arrived and as and when the said appropriate time arrives the said tape will be deposited with the Prothonotary and Senior Master. According to him the appropriate time is during the course of the trial of the suit which is likely to take still a long time. The learned counsel for the plaintiff has thereafter contended that the preservation of the tape requires a highly scientific method and this method is not available in the office of the Hon'ble court which would result in the damage to tape-recorded conversation. He has further contended that by virtue of his position and knowledge only he is capable of preserving of the said tape recorder tapes in his own custody. And therefore the tapes should be permitted to be kept with the plaintiff and he should not be directed to deposit the same with the office of the Prothonotary and Senior Master.

6. I am unable to accept any of the contentions advanced by the learned counsel for the plaintiff. The averment contained in para-68 of the plaint makes it clear that he himself has offered to deposit the tapes in

the office of Prothonotary and Senior Master alongwith its transcription. He his bound by his statement made on oath and cannot go back thereon. In any event it is the duty of the court that the evidence is protected and preserved which is likely to be used in the course of the trial. The plaintiff is a party to the litigation and thus an interested party. Therefore the contention of the plaintiff that he is the only person who is capable of preserving the said tape recorder and thus should be permitted to keep the tape recorder in his custody and should not be directed to deposit the same in the present proceedings with the office of Prothonotary and Senior Master can not be accepted. It is essential that the tape recorded conversation in the tape being highly sensitive evidence the same is required to be preserved intact so as to utilize the same at the time of and in the course of evidence. In view thereof it is necessary that the said tape be protected even from being tampered upon by the plaintiff as he has scientific knowledge and background. In the aforesaid circumstances, I am of the opinion that the tape should be deposited with the office of the Prothonotary and Senior Master, High Court, Bombay.

7. The learned counsel for the plaintiff has lastly contended that the defendant no.1 not being a party to the conversation he is not entitled to maintain the present chamber summons. It is an admitted position that the defendant no.1. is a party to the suit and as party to the suit he is entitled to take out the present chamber summons to protect the evidence which may be produced in the course of the trial. I am not inclined to accept the said contention of the learned counsel for the plaintiffs.

8. As such I pass the following order:

i) The plaintiff is directed to deposit with the office of Prothonotary and Senior Master the tapes containing recorded conversation which has been relied upon in para-68 of the plaint within a period of two weeks from today.

ii) The office of Prothonotary and Senior Master shall seal the said tapes containing

recorded conversation.

iii) The plaintiff is also directed to produce the transcriptions of the tape recorded conversation and furnish the copy to all the parties to the suit as well as to the Prothonotary and Senior Master.

iv) The office of Prothonotary and Senior Master is directed to have consultation and obtain an expert opinion for the preservation of the said tapes.

v) The Prothonotary and Senior Master shall take all steps which are required and are necessary and/or recomended by the expert for the purpose of appropriate preservation of the said tapes containing recorded conversation to be utilized at the trial of the suit.

vi) The defendant no.1 shall make payment of all charges for the consultation of the expert and or any other expenses required for the purpose of appropriate preservation of tapes containing recorded conversation in an appropriate atmosphere.

9. The aforesaid chamber summons is disposed off accordingly. However there shall be no order as to costs. The learned counsel for the plaintiff seeks stay of the present order. Stay refused.

sd/-

****